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NO. 83-1672

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARY NELL SCHMIDT,

Petitioner,

v.

CITY OF FAYETTEVILLE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari, originally filed by the Petitioner's attorney-son (who testified in the case) but converted to a pro se Petition, erroneously states in the first paragraph that the United States Court of Appeals for the Fourth Circuit made an error which "resulted in the exclusion of evidence demonstrating severe zoning discrimination, . . . " (Petition, p. 2) The evidence which the Petitioner complains of was in fact admitted by the trial court, as the Petitioner further demonstrates in her Petition at page 5 (where she quotes from a page of the trial transcript which was not included in the appendix by the Petitioner in her appeal to the Fourth Circuit Court of Appeals). Even if the Petitioner had

requested that the Clerk of the Court of Appeals certify the record under Rule 19 of the United States Supreme Court Rules, the matters set out on page 5 of the Petition would not have been included because they were not designated by the Petitioner as a part of the appendix to the Fourth Circuit Court of Appeals. This does not comply with Rule 34.1(g) of the Rules of the United States Supreme Court.

Notwithstanding the Petitioner's insistence that the " . . . preclusion (of evidence) has resulted in serious prejudice to . . . the Petitioner," the evidence was in fact received at the trial stage.

The Petitioner included in her statement of the case certain selective facts from the trial, but failed to

include many of those which buttress Judge Britt's findings. There are, however, ample facts in this record to sustain not only Judge Britt's judgment and his findings but also the per curiam opinion of the Fourth Circuit Court of Appeals when it determined that the case presented no new issues which had not already been "decided authoritatively." (Appendix B, p. 11A of the Petition) The only question which the Petitioner raises by her statement of the case seems to concern the weight to be given the evidence which was admitted by Judge Britt.

The Petitioner alleged in her Complaint, First Claim for Relief:

> that the City of Fayetteville, through its enforcement of the Municipal Zoning Ordinance with respect to Plaintiff's property and through its City Council's refusal

> to amend the Municipal Zoning Ordinance with respect to Plaintiff's property, denies Plaintiff any reasonable, economically viable use of her property; that the City of Fayetteville, under Color of State Law, has deprived the Plaintiff of her right not to be deprived of her property without just compensation therefor and without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (Complaint, paragraph XI)

The Second Claim for Relief alleged that the matters set out in the First Claim for Relief:

> have deprived the Plaintiff of her right not to be deprived of her property without just compensation therefor and without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; that the Plaintiff is entitled to recover pursuant to the provisions of 42 U.S.C., §1983, and is further entitled to recover pursuant to the provisions of 42 U.S.C., §1988. (Complaint, Second Claim for Relief, paragraph III)

In the Pre-Trial Conference, the parties were unable to agree upon the

legal issues to be submitted to the Court for determination; however, under the guidance of United States Magistrate Leonard, the contentions of each party as to the legal issues involved were stated. The Plaintiff's issues were stated as follows:

> a. Has the Defendant, City of Fayetteville, under Color of State Law, through its enforcement of the Municipal Zoning Ordinance with respect to Plaintiff's property and through its City Council's refusal to amend the Municipal Zoning Ordinance with respect to Plaintiff's property, denied the Plaintiff any reasonable, practical and desirable use of her property so as to deprive the Plaintiff of her property without just compensation therefor and without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

The other issues contended by the Petitioner related to damages and attorney's fees.

The Petitioner also stated her contentions as to the facts in the Pre-Trial Order as follows:

(a) That since the initial zoning of Plaintiff's property as "R-15 Residential" in 1961, there has been a substantial change in the character and nature of the Plaintiff's property and the surrounding area so as to render Plaintiff's property wholly unsuitable and unfit for use as residential property.

(b) That in 1980, the City Council of the Defendant refused to rezone said property to a "P-2 Professional" classification and has thus denied to the Plaintiff any practical and desirable use of said premises, unreasonably and capriciously.

(c) That such actions by the Defendant in enforcing its zoning ordinance and refusing to modify same as reflects changes in it and the surrounding community has violated Plaintiff's rights not to be deprived of her property without just compensation therefor without due process of law.

(d) That because of the aforesaid actions by the Defendant, the Plaintiff has been damaged monetarily.

The case was tried upon the theory of an inverse condemnation. At the conclusion of the evidence, the trial court rendered judgment for the Defendant. The judgment was affirmed on appeal to the Fourth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

1. This Petition should not be granted because it does not meet the considerations governing review on certiorari set out in Rule 17 of the United States Supreme Court Rules.

2. The Petition should not be granted because the Petitioner's real argument concerns the weight to be accorded to evidence which was received.

3. The Petition should not be granted because the Petitioner should not be allowed to change the theory of her case after her evidence has been

received, and she has stipulated to the issues in the Pre-Trial Order.

ARGUMENT

1. Rule 17 of the United States Supreme Court Rules specifies the considerations governing review on certiorari. In this case, an appeal from a federal Court of Appeals, Petitioner has not set out any of the grounds provided in Rule 17.1(a). She has pointed to no conflicting decisions with another federal Court of Appeals, nor has she indicated that the Fourth Circuit Court of Appeals has decided a federal question in a way which conflicts with a state court of last resort. Neither has she indicated that this case in any way departs from "accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower

court, as to call for an exercise of this Court's power of supervision." Rule 17.1(a).

The only remaining consideration would be whether or not the Fourth Circuit Court of Appeals had decided an important question of federal law which has not been settled by the Supreme Court of the United States, or had decided a federal question in conflict with the decisions of the Supreme Court of the United States as provided in Rule 17.1(c). The Petition is devoid of any argument that the decision of the Court of Appeals, in affirming the District Court, will have any national significance for litigants.

The Petitioner does not point out in her Petition any way in which this Petition complies with the considerations

required by Rule 17. It therefore should not claim the attention of this Court, as a decision by the Supreme Court of the United States in this matter would furnish no useful guidelines or standards to trial courts acting in obedience to them.

2. Petitioner's real argument seems to be, not that the evidence was refused, but that the trial judge did not accord it the same kind of weight that the Petitioner had hoped and did not adopt the Petitioner's new theory of the case. The trial judge, acting as judge and jury in this case, was the appropriate determiner of the weight and credibility of the evidence. The Petitioner complains that her evidence was not "addressed", but, in reality, the Petitioner means that the Court did not accept it

and adopt it. The Supreme Court does not grant the writ of certiorari merely to review evidence or inferences to be drawn from that evidence. Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 82 L.Ed. 1273, 58 S. Ct. 849 (1938).

In any event, the Petitioner cannot complain in this instance because the evidence received was favorable to her. At trial, the Respondent objected to the evidence adduced by the witness, Robert Michael Schmidt, III, the Petitioner's son, concerning certain other properties located within the City of Fayetteville as being irrelevant to this proceeding. (Transcript Vol. 2, p. 7) In ruling upon the motion, the District Court observed that the "Pre-Trial Order does not set forth at all any contention that the ordinance should be used (ruled) as

unconstitutional and (as) applied to your client. And the local rules of this court provides that any contention not set forth in the Pre-Trial Order are deemed abandoned." (Transcript Vol. 2, p. 11)

The admission of evidence is generally held to be harmless if it is favorable to the complaining party. United States v. Roberts, 62 F.2d 594 (10th Cir. Colo. 1932); Maryland Cas. Co. v. Kern County, 83 F.2d 774 (9th Cir. Cal. 1936). The complaining party has the burden of showing that he was injured by the admission of the evidence. Haywood v. United States, 268 F. 795, (7th Cir. Ill. 1920) cert. denied, 256 U.S. 689, 65 L.Ed. 1172, 41 S. Ct. 449. The burden is on the complaining party to show from the record as a whole that he

was deprived of some substantial right. Morgan v. United States, 98 F.2d 473 (8th Cir. Ark. 1938), cert. denied, 305 U.S. 648, 83 L.Ed. 419, 59 S. Ct. 229, reh. den., 305 U.S. 374, 83 L.Ed. 437, 59 S. Ct. 248. Even though incompetent or immaterial evidence is introduced, it cannot be said to be prejudicial where the case is tried before the Court without a jury since there is a presumption that the Court considered only the competent evidence. Morris v. Williams, 149 F.2d 703 (8th Cir. Ark. 1945).

The Petitioner states that "only after the Court issued its unpublished opinion did it become apparent that the issue in evidence was not reviewed by the Court." (Petition, p. 13) On the contrary, there is a presumption that the Court did consider it.

3. The Petition should not be granted because the Petitioner should not be allowed to change the theory of her case after the evidence was received and she had stipulated to the issues in the Pre-Trial Order.

In the Pre-Trial Order, the Petitioner stated both the issues to be tried by the judge and gave her contentions as to the facts. In neither did the Petitioner raise the question of unconstitutional zoning discrimination as applied to her property. The District Court Judge ruled that, although the matter was contained in the pleadings (Transcript Vol. II, p. 9), it was not set forth in the Pre-Trial Order and was deemed to be abandoned under the local rules of Court. (Transcript Vol. 2, p. 11, Rule 26:04)

The Pre-Trial Order "controls the subsequent course of the action, unless modified at trial to prevent manifest injustice." 3 Moore's Federal Practice ¶16.19, pp. 16-40. "Nor is the Court required to make findings as to issues which have been eliminated from the case by the pre-trial order." Moore's, supra, at pp. 16-42; Fanchon and Marko, Inc. v. Hagenbeck-Wallace Shows Co., 624 F.2d 168 (9th Cir. 1980); Allen v. U.S. Steel Corp., 665 F.2d 689 (5th Cir. 1982); United States v. First Nat. Bank of Circle, 652 F.2d 882 (9th Cir. 1981).

After objection by the Respondent's counsel to the introduction of evidence concerning "similarly situated properties" as being irrelevant, the court received the evidence but commented that it was

not embraced within the Pre-Trial Order. At that time, counsel for the Petitioner made no attempt to amend the Pre-Trial Order, and such a failure to seek an amendment prevents the raising of the issue on appeal. Neuspickle v. City of Knoxville, Tennessee, 48 F.R.D. 441 (E.D. Tenn. 1969), where it is stated:

> The parties are bound by the issues in the pre-trial order and may not later inject a new issue except in exceptional cases . . . if present issues at the trial were not contained in the pre-trial order, he should have asked for an amendment to the pre-trial order.

The Petitioner's Petition complains loud and long concerning the nature and quality of the Pre-Trial Order adopted; she was nevertheless assisted by able counsel in both the formulation of the Pre-Trial Order and throughout the course of the trial.

Notwithstanding such assistance, the Petitioner complains that the Court did not assist properly in the formulation of issues for trial. In fact, a pre-trial hearing was held by the Magistrate when the Order was entered. It is not incumbent upon the hearing magistrate to forge an order defining the issues where the opposing parties are in complete disagreement. M.C.I. Com. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983). When such an order is entered, it should control the course of the trial, unless modified. Union Planters Nat. Bank v. Com. Credit, 651 F.2d 1174 (6th Cir. 1981), cert. denied, 454 U.S. 1124, 102 S. Ct. 792, 71 L.Ed.2d 111. The parties are bound by the Pre-Trial Order, and are not to introduce at trial issues other than those included in the Order.

McKinney v. Galvin, 701 F.2d 584 (6th Cir. 1983); Allen v. U.S. Steel Corp., 665 F.2d 689 (5th Cir. 1982).

While the Court is authorized to modify the order to prevent manifest injustice, it should not allow a new theory of the case to be injected. Solar Fuel Co. v. United Mine Workers, 346 F.Supp. 789 (W.D. Pa. 1972), aff'd 481 F.2d 1399, cert. denied, 416 U.S. 909. Where the pre-trial order precludes the raising of issues at trial, it also precludes their being raised on appeal. Hodges v. United States, 597 F.2d 1014 (5th Cir. 1979).

Since the Petitioner did not move to amend the Pre-Trial Order, she argues, alternately: that the issue was contained within the Order anyway (which it manifestly was not); that liberal Rule 15 of the

Rules of Civil Procedure allowing amendments to pleadings should apply to the Pre-Trial Order (even though such an amendment was never requested) and it should be considered as a de facto amendment; and finally that the Court should consider the issue on appeal even if there was no amendment to the Pre-Trial Order.

The Petitioner's Petition clearly shows that the exchange between the trial judge and the Petitioner's counsel indicated the necessity to amend both the Pre-Trial Order and the Complaint if the theory was to be changed. Notwithstanding the intimation, nothing was done. Nevertheless, the evidence was received and presumably weighed by the court in arriving at its judgment. The Petitioner should not be heard to complain at this stage of the proceedings

about the weight that the court accorded to that evidence. The substance of the Petitioner's argument in this regard seems to be that the Court did not find in her favor.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted this 12th day of December, 1984.

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CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals by depositing same in a United States mail box with First-Class postage prepaid and addressed as follows to the Petitioner appearing pro se:

Mary Nell Schmidt
5303 Raeford Road
Fayetteville, NC 28304

This 12th day of December, 1984.

L. Stacy Weaver, Jr.